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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51-1

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

v.

YELLOWSTONE PARK LINES, INC., a corporation,
and YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Defendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in *Peter J. Brennan, Secretary of Labor, United States Department of Labor* v. *Yellowstone Park Lines, Inc. and Yellowstone Park Company,* No. 72-1591, entered May 10, 1973.

Opinions Below

On May 22, 1972, the United States District Court for the District of Wyoming (Kerr, D.J.) granted the motion of defendants Yellowstone Park Lines, Inc. and Yellowstone

Park Company for summary judgment and ordered the Secretary of Labor's complaint dismissed with prejudice on the ground that 29 U.S.C. §213(a)(3)* exempts the defendants from the minimum wage and overtime provisions of the Fair Labor Standards Act as amended, 29 U.S.C. §201 *et seq.* Judge Kerr's order is not generally reported and appears in Appendix A hereto at pp. a1-a2. Judge Kerr's Special Findings of Fact in Support of Summary Judgment are not generally reported and appear in Appendix B hereto at pp. b1-b10. On May 10, 1973, the United States Court of Appeals for the Tenth Circuit reversed the District Court in an opinion not yet generally reported (it is reported in 1973 CCH Labor Law Reporter (Federal Wages-Hours), Para. 32,900) which appears in Appendix C hereto at pp. c1-c11.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1973. On June 4, 1973 an Order was entered by the Court of Appeals granting to the defendants a stay of the mandate until July 5, 1973, pending defendants' filing a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Are the integrated facilities operated within the borders of a national park on a seasonal basis by a concessioner of the United States Department of the Interior

* This is Section 13(a)(3) of the Fair Labor Standards Act and is codified under Title 29 of the United States Code as Section 213(a)(3). It will be referred to hereinafter as Section 213(a)(3) and all other Sections of the Fair Labor Standards Act hereinafter mentioned shall be referred to by their codified designations.

for the sole purpose of serving and accommodating the visitors to the park an "establishment" within the meaning and for the purposes of Section 213(a)(3) of the Fair Labor Standards Act?

2. Are employees who perform services for more than one recreational establishment exempt under Section 213 (a)(3) from the minimum wage and overtime provisions of the Fair Labor Standards Act?

The District Court answered the first question in the affirmative and therefore did not reach the second question, while the Court of Appeals explicitly answered the first question in the negative and implicitly answered the second question in the negative.

Statutes Involved

The statutory provision involved is Section 213(a)(3) of the Fair Labor Standards Act which reads as follows:

"§*213. Exemptions*

(a) The provisions of section 206 . . . and section 207 of this title shall not apply with respect to—

* * * * *

(3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; . . ."

The other provisions of the Fair Labor Standards Act which are cited and discussed in this Petition are set forth in Appendix D hereto at p. d1.

Statement of the Case

The Secretary of Labor (hereinafter "the Secretary") brought this action in accordance with Section 217 of the Fair Labor Standards Act (hereinafter "the Act") to enjoin Yellowstone Park Company and Yellowstone Park Lines, Inc. (hereinafter collectively referred to as "Yellowstone" or "the Company") from violating the minimum wage and overtime provisions (Sections 206 and 207, respectively) of the Act. Yellowstone denied that it was violating the Act, claiming an exemption from the minimum wage and overtime provisions of the Act under Section 213(a)(3).

Yellowstone operates facilities and accommodations, such as hotels, inns and cabins, within Yellowstone National Park as a concessioner under the terms and conditions of an agreement with the United States Department of the Interior, National Park Service (Sp. F. 11).* The Agreement provides that Yellowstone must operate these facilities and accommodations in a manner that is satisfactory to the Government (Sp. F. 12). It also provides that all rates and prices charged to the public by Yellowstone are subject to Government regulation and approval (Sp. F. 12).

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* Sp. F refers to the Special Findings of Fact made by the District Court which appear in Appendix B hereto.

The Yellowstone facilities are centrally managed and operated and are located at the major scenic places and tourist attractions in the Park, namely Old Faithful Geyser, Mammoth Hot Springs, Yellowstone Lake and the Grand Canyon of Yellowstone (Sp. F. 13). Those at Old Faithful, for example, consist of Old Faithful Inn, Old Faithful Lodge and Old Faithful Campers Cabins (Sp. F. 15). Those at Yellowstone Lake consist of Lake Hotel, Lake Lodge and Lake Hotel Cabins. Each facility offers a variety of accommodations to meet the needs and requests of the public.

Yellowstone employs mostly college students during its season and they are all employed under the terms and conditions of the same Employee Work Agreement (Sp. F. 19). They are hired and assigned to jobs according to the needs of Yellowstone. They are not hired for a specific facility. Employees may be, and frequently are, transferred from one facility to another during the season, according to Yellowstone's needs (Sp. F. 19 and Sp. F. 20). They all serve the millions of visitors to the Park, whether as waiters, maids, reservations clerks, bellboys or laundry workers.

The Secretary contended that Yellowstone's facilities were physically separate and each one therefore constituted a single establishment. On the basis thereof the Secretary contended that two groups of Yellowstone's employees were not exempt, namely (1) those employees employed by Yellowstone who work at more than one facility and (2) those employees employed by Yellowstone who work at one facility but whose work benefits more than one facility. Yellowstone contended that all of its facilities in Yellowstone Park constituted a single establishment be-

cause they all have the same purpose, namely to serve and accommodate the people who visit the Park, and are functionally integrated with central management, central accounting and bookkeeping, central hiring and interchange of employees.*

The parties stipulated to the facts and further stipulated as to their respective contentions with respect to Yellowstone's employees and the general nature of the issue to be presented to the District Court.

On March 8, 1972, Yellowstone moved for summary judgment in the United States District Court for the District of Wyoming and on April 14, 1972 the Secretary cross-moved for summary judgment. On May 22, 1972 the District Court granted Yellowstone's motion on the basis of twenty-nine Special Findings of Fact which supported the court's judgment that Yellowstone was an amusement or recreational establishment within the meaning of Section 213(a)(3) and entered an order granting Yellowstone's motion for summary judgment and dismissing the Secretary's complaint with prejudice.

The Secretary appealed from the District Court's order and the appeal was argued before the United States Court of Appeals for the Tenth Circuit on March 29, 1973. On May 10, 1973, judgment was entered by the Court of Appeals, reversing the District Court's judgment and remanding the cause for entry of an injunction. Yellowstone thereupon made application to the Court of Appeals for a stay of that Court's mandate and on June 4, 1973, the Court of Appeals granted Yellowstone's application.

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* Yellowstone asserted that it met both seasonal tests of Section 213(a)(3) and the Secretary never contended that it did not.

Reasons for Granting the Writ

A. ***With respect to Question 1 above, there are two basic reasons why this Court should grant this Petition for a Writ of Certiorari—(1) conflict in the Circuits and (2) novel question.***

1. Conflict in the Circuits

There are a number of important exemptions to the minimum wage and overtime provisions of the Act. Several of these exemptions use the word "establishment" and the determining factor in the application of these exemptions is how that word is interpreted. "Establishment" and "recreational establishment" are nowhere defined in the Act.

There are only two reported cases in which the word "establishment" has been interpreted by the courts in connection with the exemptions other than the "retail establishment" exemption contained in Section 213(a)(2). In the one, *Shultz* v. *Hasam Realty Corp.*, 316 F. Supp. 1136 (S.D. Fla. 1970), *aff'd* on the basis of the opinion of the District Court, 442 F.2d 1336 (5th Cir. 1971), the Fifth Circuit interpreted "establishment" to include several facilities which were physically separated but which were functionally integrated with central management, central bookkeeping, central hiring, and with interchange of employees, whereas in this case the Tenth Circuit interpreted "establishment" not to include several facilities which were similarly functionally integrated but which were also physically separated.

There is, therefore, a clear conflict between the Tenth and Fifth Circuits concerning the meaning of the word "establishment" in connection with exemptions to the Act.

The parties to this action stipulated below that Yellowstone's operations in Yellowstone National Park were an enterprise* within the meaning of the Act and were therefore subject to the Act. Yellowstone contended that its several facilities constituted a single establishment and thus were exempt under Section 213(a)(3), whereas the Secretary contended that each of the facilities constituted a single establishment and therefore certain employees were not exempt. The Tenth Circuit held, in reversing the District Court, that each of Yellowstone's facilities was a single establishment.

The question before the Fifth Circuit in *Hasam* was whether defendants' hotel complex, stipulated by the parties to be an enterprise within the meaning of the Act, was also a single establishment, as defendants contended, or whether it was five separate establishments, as the term "establishment" is used in Section 213(b)(8), as the Secretary of Labor contended. The Fifth Circuit held that the hotel complex, although composed of five separate facilities, two of which were located in one Florida city and two in another with the fifth in a different county from the other four, was a single hotel establishment within the meaning of Section 213(b)(8).

In *Hasam,* as in this case, the Secretary contended that the exemption sought was unavailable as to those employees who perform what the Secretary calls "central office operations" for the entire complex or group of facilities, as opposed to those employees who work in and for one of the individual facilities or "establishments."

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* Enterprise, unlike establishment, is defined in the Act in Section 203(r).

The categories of employees whom the Secretary contended were not exempt from the provisions of the Act in each case are strikingly similar. In *Hasar* the Secretary contended that the following categories of employees, among others, were not exempt from the provisions of the Act on the basis that their work involved or benefited more than one facility:

(1) Central accounting office employees

(2) Executive office employees

(3) Reservations office employees

(4) Public relations office employees

(5) Laundry employees

(6) Print shop employees

(7) Central maintenance and repair employees who take care of maintenance and repairs on all the hotel's facilities and properties.

In this case, the Secretary contended that the following categories of employees, among others, were not exempt from the provisions of the Act on the aforesaid basis that their work involved or benefited more than one of Yellowstone's facilities:

(1) Central accounting office employees

(2) Manager's office employees

(3) Reservations office employees

(4) Advertising and promotion office employees

(5) Laundry employees

(6) Print shop employees

(7) Central maintenance and repair workers who perform functions which serve several or all of the company's establishments in the Park.

Because the Fifth Circuit held that all of the hotel's facilities constituted a single establishment, that court found that the aforesaid employees were employed by a single establishment and were therefore exempt, contrary to the Secretary's contention. In this case, however, because the Tenth Circuit held that Yellowstone's operations consisted of several establishments, the Tenth Circuit found that the aforesaid employees were not exempt in accord with the Secretary's contention that they were "central office employees."

In determining that the five separate facilities of the hotel complex constituted a single establishment, the Fifth Circuit stressed that the hotel was "a single, cohesive unit" with common ownership and a common payroll. It also stressed that (1) no separate records were maintained by each of the five facilities but rather that the general accounting department maintained payroll, financial and accounting records for all of the facilities; (2) the hiring for all five facilities was done through a central office; (3) the employees were not hired to work solely in one of the five facilities and the employees were often interchanged between the various hotel facilities, according to the needs of the hotel.

In this case, although the District Court found that (1) all of the facilities operated by Yellowstone are centrally managed (Sp. F. 16); (2) all the books and records for the facilities are maintained and prepared by the cen-

tral accounting office and no separate books and records are kept for the individual facilities (Sp. F. 17); (3) all employees who work in the various facilities are hired by Yellowstone to work for the Company (Sp. F. 19), are employed under the terms and conditions of the same Employee Work Agreement (Sp. F. 19), are assigned to specific jobs by the Company according to its needs (Sp. F. 19) and are often transferred by the Company from one facility to another according to the needs of the Company (Sp. F. 20), the Tenth Circuit nevertheless held that Yellowstone's facilities do not constitute a single establishment.

Therefore, although the District Court in *Hasam* and the District Court in this case found the same facts with respect to the functionally integrated operation of the respective facilities, we find that in *Hasam* the Fifth Circuit held that the several physically separate facilities constituted a single establishment while in this case the Tenth Circuit held that the several physically separate facilities did not constitute a single establishment.

The essential difference between the Fifth Circuit's test of an "establishment" and the Tenth Circuit's test is that the Tenth Circuit applied as its sole criterion in determining what constitutes an "establishment" one of physical distance or geographic separation* whereas the Fifth Cir-

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* It applied this as its sole criterion despite the fact that in *Shultz* v. *Adair's Cafeterias, Inc.*, 420 F.2d 390 (10th Cir. 1969), a case relied upon by the Tenth Circuit in this case, that court applied the so-called "public access" test which asks the question does the public have access to the particular facility and does the facility serve and accommodate the public. In *Adair's*, the Tenth Circuit stated (at p. 395): "[T]he public was not invited nor allowed to purchase from the bakery" and therefore the bakery was not a "retail establishment." The Tenth Circuit, however,

cuit applied a broader test which included not only physical separation but also functional and employee separation or integration. The Tenth Circuit determined that the facilities of Yellowstone consisted of more than one establishment *solely* because there was physical distance between the various facilities, without considering that they operate as a functionally integrated unit. The Fifth Circuit, on the other hand, applied the functional test and decided that although there was physical separation between the various hotel facilities, nevertheless, they did constitute a single establishment because they operated as a functionally integrated unit.

The Tenth Circuit is also in conflict with the Sixth, Seventh and Eighth Circuits when it applies physical separation as the sole test to determine the meaning of the word "establishment" as used in various exemptions to the Act. Those Circuits, like the Fifth Circuit in *Hasam*, have applied a functional test as the primary test to determine the meaning of "establishment". In applying that test they have found certain facilities not exempt because they were functionally separate even though physically united with exempt facilities. See *McComb* v. *W. E. Wright Co.*, 168 F.2d 40 (6th Cir. 1948); *Walling* v. *Goldblatt Bros.*, 152 F.2d 475 (7th Cir. 1945); *Fred Wolferman, Inc.* v. *Gustafson*, 169 F.2d 759 (8th Cir. 1948); and *McComb* v. *Wyandotte Furniture Co.*, 169 F.2d 766 (8th Cir. 1948). While these cases all denied claimed exemptions, they did make clear that physical proximity is not the criterion for defin-

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failed to use this "public access" test in this case. If it had, it would clearly have found that all Yellowstone facilities are open to the public and indeed exist only to serve and accommodate the public.

ing an establishment. See also another Fifth Circuit case, *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F.2d 645 (5th Cir. 1961).

In applying the physical separation test as the only test in determining what is an "establishment", the Tenth Circuit relied on this Court's decision in *Phillips Co.* v. *Walling*, 324 U.S. 490 (1945), wherein this Court held that a centralized warehouse, which serviced defendants' 49 retail grocery stores, was not a "retail establishment" within the meaning of Section 213(a)(2). The *Phillips* decision considered the term "retail establishment" in connection with an exemption provided for in Section 213(a)(2), not the term "recreational establishment" under Section 213 (a)(3). The Tenth Circuit acknowledged that "[M]uch of the law which deals with the retail establishment exemption is concerned with the difference between retail and wholesale activities". This is certainly true with respect to *Phillips* where, despite the dictum that an "establishment" is a distinct physical place of business,* this Court in fact *decided* that the facility in issue in *Phillips* was not entitled to an exemption, primarily because as a warehouse it was *functionally* separate from the other facilities. Thus, the Tenth Circuit relied only on dictum from *Phillips*, not its reasoning and not its holding.

The Fifth Circuit in *Hasam*, on the other hand, found the *Phillips* case and the other cases, such as *Mitchell* v. *Bekins Van & Storage Company*, 352 U.S. 1027 (1957),

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* Petitioners contended below that Yellowstone National Park was a distinct physical place of business for the purposes of the Act. It should be noted that the concession granted to Yellowstone covers the entire Park in a single agreement between Yellowstone and the National Park Service (see p. 4, *supra*).

which interpreted Section 213(a)(2) and "retail establishment" to determine the availability of that exemption to a warehouse, not persuasive with respect to a definition of "establishment" in the context of Section 213(b)(8). "This Court is simply unable to see any strong similarity between . . . a central warehouse servicing a vast chain of grocery stores and the Diplomat Hotel" (316 F. Supp. 1136 at p. 1143). Petitioners are unable to see any similarity between a central warehouse servicing a vast chain of grocery stores and their operations, which, we maintain, are very similar to the Diplomat Hotel operations.

Moreover, the Tenth Circuit's reliance upon *Phillips* is more pointedly misplaced when we consider the purposes for which Congress passed Sections 213(a)(2) and 213(a)(3), respectively. Congress adopted Section 213(a)(2) to protect the local grocery stores (the so-called "Mom and Pop" stores) from the competition of the large chain stores and to protect the independent wholesaler who would be at a competitive disadvantage if the large chain store could obtain an exemption for its wholesale operation. The rationale of *Phillips* and *Bekins Van & Storage* is that a chain store system which combines wholesale and retail elements into a single operation must not be allowed to have the wholesale element gain the exemption Congress meant only for the retail business. It is clear that there is no wholesale aspect to the Yellowstone operations, which exist solely to serve and accommodate the public.

Section 213(a)(3), however, was adopted by Congress for completely different purposes and therefore the word "establishment" in this Section should be interpreted to carry out these purposes. Congress passed the "recrea-

tional establishment" exemption in 1966 essentially for two purposes—(1) to protect domestic recreational facilities and operations from foreign competition and (2) to afford our young people an opportunity to obtain summer jobs.* Both of these purposes are defeated if the facilities operated by Yellowstone in Yellowstone National Park and similar facilities operated in the other national parks are excluded from the exemption, even though they meet the prescribed seasonal tests. Yet, this is precisely the result if the "recreational establishment" exemption is interpreted as it was by the Tenth Circuit in this case. In this interpretation, the exemption would apply only to those recreational operations which consist of one facility or building, or, at the most, a few buildings which are contiguous and thus meet the physical separation test. Because many recreational operations, including those at issue in both this case and *Hasam,* consist of several physically separate facilities, the exemption would have little application if the Tenth Circuit's position is allowed to stand.

We recognize, as the Tenth Circuit pointed out in its opinion, that the coverage provisions of the Act are normally broadly construed and the exemptions are narrowly construed so as to carry out the basic purpose of the Act which is to protect the working man and woman and insure that they are able to maintain a decent standard of living. This basic purpose, however, is not contravened by the construction which the petitioners contend should be given

* For the limited legislative history on this point, see 112 Cong. Rec. 20593 and 20595, Hearing on S. 1986 Before the Comm. for Labor & Public Welfare, 89th Cong., 1st Sess., pt. 2 at 935 (1965) and H.R. 871 (to accompany H.R. 10518) 89th Cong., 1st Sess. 86 (1965).

to Section 213(a)(3). On the contrary, the Tenth Circuit's interpretation of that Section would defeat its purposes by pricing many young unskilled college students out of the labor market and by placing this country's recreational operations at a competitive disadvantage with their foreign counterparts.

For the foregoing reasons this Court should clarify the meaning of "establishment" * as used in the several exemptions in the Act which were adopted for different reasons and at different times and should enunciate what tests should be applied by the lower courts in deciding whether a business operation consisting of more than one facility is an "establishment".

2. Novel Question

Section 213(a)(3) of the Act is the controlling statute for all seasonal recreational or amusement operations in the country. Its application will have substantial effect upon those operations, upon their hiring policies, upon their operating costs and upon the rates they will charge. This Court has never interpreted Section 213(a)(3) nor, indeed, Section 213(b)(8). These Sections provide exemptions for all seasonal amusement or recreational establishments and all hotel and motel establishments. It is most

* The need to clarify the meaning of "establishment" in the context of Section 213(a)(3) becomes strikingly obvious in light of *Hodgson* v. *Texas City Dike and Marine, Inc.*, 1973 CCH Labor Law Reporter (Federal Wages-Hours), Para. 32,882 (S.D. Tex. Feb. 7, 1973), in which the Court observed that the Administrator, Wage, Hour and Public Contracts Division of the Department of Labor, has issued an opinion that "national parks establishments" are exempt from the Act by reason of Section 213(a)(3) and the Court relied on the analogy between "national parks establishments" and defendant's operations in granting an exemption to defendant.

important to define "establishment" in the context of the recreational establishment and the hotel establishment exemptions and to clarify what test or tests should be applied in deciding whether two or more facilities constitute an "establishment".

If the word "establishment", as used in Section 213(a)(3) and in Section 213(b)(8), is defined as narrowly as the Tenth Circuit defined it in this case, most recreational or amusement operations and indeed many hotels will be adversely affected because most such operations consist of several physically separated facilities or buildings. Thus, if physical separation is the sole test, as the Tenth Circuit held, most recreational operations in the United States will be excluded from the "recreational establishment" exemption which was in fact adopted to give these recreational operations the opportunity to compete with similar foreign operations and to hire a number of unskilled young people. Instead, these recreational operations, including not only those located at our national parks but also those located elsewhere throughout our country, will be impelled to reduce their staffs and raise their rates,* both contrary to the purposes of Congress in enacting Section 213(a)(3).

Moreover, if the Tenth Circuit is correct (and we vigorously contend that it is not) that physical separation is the sole test to be applied in determining the meaning of "establishment", it is respectfully submitted that this Court should spell out more precisely what physical separation means, other than the vague "distinct physical place of business" phrase which was relied on by the Tenth Circuit.

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* An increase in rates could well have an adverse effect upon this country's serious balance of payments problem, for our national park facilities and other resorts will be less attractive to foreign tourists.

B. *With respect to Question 2 above, this Court should grant this Petition for a Writ of Certiorari as it presents a novel question.*

1. Novel Question

Section 213(a)(3) exempts "any employee employed by an amusement or recreational establishment" from the provisions of the Act. If each of the Yellowstone facilities is considered a separate establishment, as the Tenth Circuit held, nevertheless any employee working at one of the facilities is exempt, even though his work may benefit one or more of the other facilities, because *each* such facility is a recreational establishment* that indisputably meets the statutory seasonal tests and because Section 213(a)(3) exempts "*any employee* employed by an amusement or recreational establishment."

The exemption applies to "any employee" of a recreational establishment. It does not qualify who is exempt by the duties he performs. It does not say "any employee" except those whose work benefits another recreational establishment. Under the Secretary's construction, however, which the Tenth Circuit adopted, certain employees are not exempt because their duties are such that they benefit more than one facility. Is it not an artificial distinction to say that the reservations clerks located at Mammoth Lodge and the waiters or busboys who work there, all of whom are unskilled college students hired by Yellowstone for the summer under the same employee work agreement and assigned and reassigned according to the Company's

* The Tenth Circuit in its opinion (see p. c10 of Appendix C) stated that "the employees exempted are those who are employed by an exempt establishment." Thus, the Tenth Circuit implicitly found that each of Yellowstone's facilities constituted an exempt recreational establishment.

needs, are governed by different salary regulations? Or, to say that certain maintenance employees are not exempt just because they serve several of Yellowstone's facilities whereas the other maintenance employees are exempt?

In its opinion (see pp. c10 and c11 of Appendix C), the Tenth Circuit refers to a letter from the Secretary wherein the Secretary conceded that all of Yellowstone's employees, including maids, were exempt under Section 213(a)(3), except for "central employees who perform functions which serve several, or all, of the company's establishments. . . . " Certain job categories that the Secretary considered not to be exempt are then listed, but this list does not include maids, for example, who work at more than one facility. It would appear that the Secretary concedes that maids, even those who work at more than one facility, are exempt. This must be on the basis that these employees are employed by two or more exempt recreational establishments (obviously not on the basis that all of Yellowstone's facilities constitute a single establishment) and are thereby exempt.

The only apparent difference between a maid who is exempt and a laundry worker, for example, who, the Secretary contends, is not exempt is that the former employee is physically present in the several facilities where she performs her duties while the latter employee performs her duties in one facility although her work benefits several other facilities. To decide whether an employee is exempt or not on such an artificial distinction is illogical.

The Fifth Circuit faced this question in the "retail establishment" context in *Brewer's Inc.* v. *Wirtz,* 375 F.2d 911 (5th Cir. 1967). In that case the District Court had deter-

mined that certain employees were not exempt because they were employed by two separate retail establishments. The Fifth Circuit reversed and stated (p. 914):

> "* * * The holding of the court below that the employees, although employed by two retail establishments, are not within the exemption because they are not employed by a single retail establishment is clearly unsupportable. The plain words of the statute do not restrict the exemption to employees employed by only one retail establishment, and no authority has been found favoring such a restriction. The exemption applies to any employee of any retail establishment. We see no reason why a retail establishment whose employees are otherwise exempt should lose the exemption for any employee whom it permits to perform work for another retail establishment as long as the employees are working for retail establishments, and the Secretary does not press upon us any reason for making such a distinction."

This Court should resolve the novel question whether employees of a single facility that qualifies as an exempt establishment, whether retail, recreational or hotel, are also exempt when their duties require them to provide services for other similar facilities that are likewise exempt establishments.

CONCLUSION

This Petition for a Writ of Certiorari should be granted to resolve the conflict between the Fifth and Tenth Circuits concerning the meaning of "establishment" as used in the exemptions from the minimum wage and overtime provisions of the Fair Labor Standards Act, to resolve the conflict between the Fifth, Sixth, Seventh and Eighth Circuits and the Tenth Circuit concerning the test or tests to be applied in determining the meaning of "establishment," to clarify this Court's position concerning what test or tests should be applied and to answer the novel questions concerning the meaning and application of Sections 213(a)(3) and 213(b)(8), as well as 213(a)(2), of the Act.

Respectfully submitted,

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